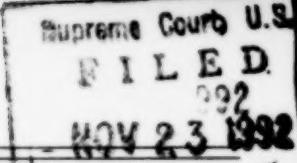


No. 92-515



IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.
TODD MITCHELL,
Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin**

**BRIEF AMICI CURIAE OF THE CALIFORNIA
ASSOCIATION OF HUMAN RIGHTS ORGANIZATIONS,
CENTER FOR DEMOCRATIC RENEWAL, COMMUNITY
UNITED AGAINST VIOLENCE, HUMAN RIGHTS/FAIR
HOUSING COMMISSION OF THE CITY AND COUNTY OF
SACRAMENTO (CALIFORNIA), INTERNATIONAL
ASSOCIATION OF OFFICIAL HUMAN RIGHTS
AGENCIES, LOS ANGELES COUNTY HUMAN RELATIONS
COMMISSION, NATIONAL ASSOCIATION OF HUMAN
RIGHTS WORKERS, NEW YORK CITY COMMISSION ON
HUMAN RIGHTS, NEW YORK CITY GAY AND LESBIAN
ANTI-VIOLENCE PROJECT, NORTH CAROLINIANS
AGAINST RACIST AND RELIGIOUS VIOLENCE AND
SANTA CLARA COUNTY (CALIFORNIA) HUMAN
RELATIONS COMMISSION IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

Henry J. Silberberg
Counsel of Record
Mark Solomon
Stroock & Stroock & Lavan
2029 Century Park East, 18th Floor
Los Angeles, California 90067
(310) 556-5800
Attorneys for Amici Curiae

36 pp

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
REASONS FOR GRANTING THE WRIT	2
I. Introduction	2
II. Discriminatory Conduct Can Be Regulated Without Punishing Beliefs Or In Any Way Implicating The First Amendment	3
III. Notwithstanding The Presence Of Any Expressive Component, Acts Of Violence And Threats Are Not Protected By The First Amendment	5
IV. Conduct With An Expressive Element Can Be Regulated Even In The Absence Of Discrimination Or Violence	6
V. There Are Legitimate, Reasonable And Content-Neutral Justifications For Bias Crime Penalty Enhancement Statutes	8
A. Excessive Violence	9
B. Random and Irrational Nature	10
C. Multiple Offenders	10
D. Serial Nature	12
E. Risk of Social Disorder	13
F. Limits Exercise of Civil Rights	14
G. Effect on Victims	16
H. Adverse Effect on Community	17
I. Cumulative Terroristic Effect	17
J. Requirement of Additional Resources ..	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986)	8
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983)	6
<i>Barnes v. Glen Theatre, Inc.</i> , ____ U.S. ___, 111 S. Ct. 2456 (1991)	7
<i>Boos v. Barry</i> , 485 U.S. 312 (1988)	6
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	6
<i>Milk Wagon Drivers U. v. Meadowmoor Dairies</i> , 312 U.S. 287 (1941)	5
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	5
<i>R.A.V. v. St. Paul</i> , ____ U.S. ___, 112 S. Ct. 2538 (1992)	7, 8, 9, 16
<i>Renton v. Playtime Theaters, Inc.</i> , 475 U.S. 41 (1986)	6, 8
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	3, 4

<i>Spence v. Washington</i> , 418 U.S. 405 (1974)	5
<i>State of Wisconsin v. Mitchell</i> , 169 Wis. 2d 153 (1992)	2
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	4, 5, 8
<i>Watts v. United States</i> , 394 U.S. 705 (1969)	6, 8
STATUTES	
18 U.S.C. § 871	8
Wis. Stat. § 939.645(1)(b)	2
Hate Crimes Statistics Act of 1990, Pub. L. 101-275	3
Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797, 102d Cong., 2d Sess. (1992)	3
OTHER REFERENCES	
Anti-Defamation League of B'nai B'rith, <i>ADL Law Report, ADL in the Courts:</i> <i>Litigation Docket 1991</i> , Fall 1991	3

<i>Black and White: A Newsweek Poll</i> , Newsweek, March 7, 1988 at 23	15
<i>Boston Police Department, Community Disorders Unit Incident Breakdown 1978 to 1991 in Boston Police Dept., 1991 Yearly Report, February 4, 1992</i>	13
D. deLeon, Telephone Interview with Dennis deLeon, New York City Commission on Human Rights, November 15, 1992 ...	14
B. Flynn, Telephone Interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Units (November 12, 1992)	13
J. Garofalo, <i>Bias And Non-Bias Crimes In New York City: Preliminary Findings</i> , Unpublished Paper (1990)	11, 18
D. Goleman, <i>As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism</i> , N.Y. Times, June 29, 1990	11
Governor's Task Force on Bias-Related Violence, Final Report (1988)	13, 15
J. Kifner, <i>Police Brace for Riots in Brooklyn</i> , N.Y. Times, Aug. 24, 1991	18

B. Levin, <i>Bias Crimes: A Theoretical And Practical Overview</i> , forthcoming 4 Stan. L. & Pol'y Rev.	9, 10, 18
J. Levin and J. McDevitt, <i>Hate Crimes: The Rising Tide Of Bigotry And Bloodshed</i> , forthcoming Spring 1993	9, 10, 11, 13, 17
Maryland State Police Criminal Intelligence Division: <i>Hate/Bias Incident Assessment</i> (1991)	11
J. McDevitt, <i>The Study Of The Character Of Civil Rights Crimes In Massachusetts (1983-1987)</i> (November 1989) (Paper presented to the American Society of Criminology on file with the author)	12, 15
New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992)	14
National Institute Against Prejudice & Violence, <i>The Ethnoviolence Project</i> , Institute Report No. 1 (1986)	12, 16
Pomerantz, <i>The FBI and Terrorism</i> , FBI Law Enforcement Bulletin, Oct. 1987	17
L. Richardson, <i>61 Acts of Bias: One Fuse Lights Many Different Explosions</i> , N.Y. Times, January 28, 1992	14

Smothers, <i>Blacks in White Areas Are Found Focus of High Rate of Crimes</i> , N.Y. Times, April 28, 1990	16
Southern Poverty Law Center, <i>Move-In Violence: White Resistance to Neighborhood Integration in the 1980's</i> , Special Report (1987)	16
J. P. Stevens, Associate Justice, United States Supreme Court, Remarks at Yale Law School, October 27, 1992	19
L. Tribe, <i>American Constitutional Law</i> (2d ed. 1988) § 12-7	6
U.S. Department of Justice, Report to the Nation on Crime and Justice, 2nd Edition, March 1988	18
C. Wexler and G. T. Marx, <i>When Law And Order Works</i> , 32 Crime & Delinquency 205 (1986)	12, 13
V. N. Lee, <i>Legislative Response to Hate - Motivated Violence: The Massachusetts Experience And Beyond</i> , 25 Harv. C.R. - C.L. L. Rev. (1990)	12
Wilson & Kelling, <i>Broken Windows</i> , Atlantic Monthly, March 1982	17

INTEREST OF AMICI CURIAE

The California Association of Human Rights Organizations, the Center for Democratic Renewal, Community United Against Violence, the Human Rights/Fair Housing Commission of the City and County of Sacramento, the International Association of Official Human Rights Agencies, the Los Angeles County Commission on Human Relations, the New York City Commission on Human Rights, the National Association of Human Rights Workers, North Carolinians Against Racist and Religious Violence, and the Santa Clara County Human Relations Commission, with the consent of both litigants, appear as *amici curiae* so as to provide the Court, in addition to compelling legal analysis, material and overwhelmingly persuasive information justifying the special regulation of bias crimes. *Amici* constitute a variety of government agencies and civic organizations which provide legal, educational and other services regarding bias crimes and related matters. *Amici* have a substantial interest in demonstrating the constitutionality of bias crime statutes because of their central role in eradicating acts of bias violence. Individual descriptions of the agencies and organizations are set forth in the accompanying Appendix at pp. A6 - A9.

REASONS FOR GRANTING THE WRIT

I. Introduction

The Wisconsin Criminal Code provides for enhanced punishment when the State proves that a convicted criminal "[i]ntentionally selects the person against whom the crime . . . is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" Wis. Stat. § 939.645(1)(b).

The Wisconsin Supreme Court has held that the Wisconsin statute violates the First Amendment because it punishes "what the Legislature has deemed to be offensive thought. . . ." *State of Wisconsin v. Mitchell*, 169 Wis. 2d 153, 163 (1992). As argued herein, however, the statute represents a legitimate exercise of the State's police power to protect the health, safety and welfare of its citizens and does not, in any way, infringe upon First Amendment rights. First, the proscription of pernicious discriminatory or violent conduct, which the State has a legitimate interest in eradicating, does not in any way implicate the First Amendment. Second, even if protected free expression were somehow touched by the Wisconsin statute, there are compelling, content-neutral justifications for authorizing enhanced penalties for bias offenses. These justifications override any concern that free speech might be inhibited. Bias crimes are a criminologically distinct category of offenses that create special and quantifiable harms to society. These unique harms justify

enhanced penalties for offenders.^{1/} As shown herein, criminologists have concluded that bias crimes are particularly disruptive to individuals and communities, require a greater application of police resources, and are most often committed to deter whole groups of people from exercising rights relating to housing, employment, freedom of association and public access. Conventional criminal statutes do not address the unique evils that bias crimes pose.

II. Discriminatory Conduct Can Be Regulated Without Punishing Beliefs Or In Any Way Implicating The First Amendment

The Wisconsin statute does not criminalize beliefs. Rather, it regulates a form of discriminatory conduct -- the intentional selection of a victim based on his or her status. As such, the Wisconsin law falls squarely within the category of regulation, expressly approved by this Court, that addresses the "unique evils" caused by invidious discrimination. As the Court held in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

[A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent -- wholly apart from the point of view such conduct

^{1/} Forty-six states have enacted statutes that target bias crimes. Anti-Defamation League of B'nai B'rith, *ADL Law Report, ADL in the Courts: Litigation Docket 1991*, Fall 1991. The federal Hate Crimes Statistics Act of 1990, Pub. L. 101-275, mandates data collection regarding bias crimes. See also, The Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797, 102d Cong., 2d Sess. (1992).

may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to *no constitutional protection*.

Id. at 628 (emphasis added).^{2/}

Criminal activity motivated by prejudice can be no more protected under the First Amendment than is discrimination in the areas of housing, employment, education, freedom of association and public access. The Wisconsin statute simply and narrowly targets such criminal activity.

^{2/} The Roberts Court assumed that the relevant state statute, which forbade discrimination in access to public facilities on the basis of race, color, creed, religion, disability, national origin or sex, met the test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), viz., that the regulation furthers an important governmental interest, that the interest is unrelated to the suppression of free expression and that the incidental restriction on First Amendment freedoms is no greater than necessary to further the government interest. *Id.* at 377. Even were the Wisconsin statute to focus on the expressive content of a crime rather than on the method by which the criminal selects a victim, it would still pass constitutional muster. As demonstrated herein, the "secondary effects" of bias crimes provide an independent basis for enforcing the constitutionality of such penalty enhancement provisions. See § V infra.

III. Notwithstanding The Presence Of Any Expressive Component, Acts Of Violence And Threats Are Not Protected By The First Amendment

"The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Because violent acts and threats run counter to the purposes of the First Amendment guarantee of freedom of speech this Court has consistently allowed the government to regulate such conduct. "[In] back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind." *Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941). The fact that a threat or act of violence has an expressive component does not diminish the government's authority to punish an offender. Violence and threats simply are not afforded constitutional protection. As the Court noted in *Spence v. Washington*, 418 U.S. 405, 409 (1974):

[I]t is . . . necessary to determine whether [the] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person

engaging in the conduct intends thereby to express an idea."³

It has already been determined that crimes of violence involving status-based discrimination may be punished more severely than otherwise without offending First Amendment principles. In *Barclay v. Florida*, 463 U.S. 939, 949 (1983), this Court ruled that the defendant's racial hatred and desire to start a race war was relevant to the propriety of a capital sentence.

IV. Conduct With An Expressive Element Can Be Regulated Even In The Absence Of Discrimination Or Violence

Aside from the state's interest in eradicating discriminatory or violent conduct against its citizens, the state often has other substantial reasons, unrelated to expression or belief, to regulate conduct which has an expressive element.

In *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986), this Court ruled that a zoning ordinance that restricted the location of adult movie theaters was

³/ See also *Watts v. United States*, 394 U.S. 705 (1969) (The government may constitutionally punish bona fide threats against the President provided that it does not make viewpoint based differentiations); *Boos v. Barry*, 485 U.S. 312, 331 (1988) ("[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment," quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)). As Professor Tribe noted in American Constitutional Law (2d ed. 1988) § 12-7 at 828, n. 18, "[T]he Court . . . has been reluctant to concede that the First Amendment has any relevance whatsoever to political assassination, radical bank robberies, or other violent modes of expression."

constitutional because it "aimed not at the [expressive] content . . . but rather at the secondary effects. . ." The Court pointed to the ordinance's purpose "to prevent crime . . . and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts and the quality of urban life. . ." Similarly, in *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456 (1991), the Court held that a total ban on nude dancing was constitutional, notwithstanding any free expression interests, because the state has a legitimate interest in protecting public order and morality. Justice Scalia, in a concurring opinion, concluded that general laws regulating conduct and not specifically directed at expression do not violate the First Amendment. *Id.* at 2465.

In *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992), while holding unconstitutional a local ordinance which prohibited the display of certain symbols, the Court nonetheless reasoned that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. Indeed, the *R.A.V.* Court expressly approved longstanding precedent allowing the government to make content based prohibitions in three specific instances.

First, the Court recited that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is prescribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 2545. The Court differentiated between permissible content discrimination and impermissible viewpoint discrimination by examining laws which prohibit

threats of violence against the President. 18 U.S.C. § 871.^{4/} Second, citing *Renton*, the Court reaffirmed that differential treatment of content based groups is permissible if the disparate treatment is based on the "secondary effects" of the speech and not the expressive content. 112 S.Ct. at 2546. Third, the Court recognized that the states have broad authority to discriminate based on content when "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547.^{5/}

V. There Are Legitimate, Reasonable And Content-Neutral Justifications For Bias Crime Penalty Enhancement Statutes

States have a compelling interest, wholly unrelated to expressive content, in targeting bias crimes for heightened penalties. As Justice Stevens stated in *R.A.V.*:

Conduct that creates special risks or causes special harm may be prohibited by special rules. Lighting a fire near an ammunition

^{4/} The Federal government may constitutionally punish threats against the President because of the potential for significant societal disruption. *Watts v. United States*, 394 U.S. 705, 707 (1969). The government, however, is not allowed to punish threats solely because those threats implicate a particular point of view. *R.A.V.*, 112 S.Ct. at 2546.

^{5/} This Court consistently has refused to employ the First Amendment to shield unlawful conduct from regulation. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (upholding a law which gives the state authority to close an adult book store when prostitution takes place at the location); *United States v. O'Brien*, 391 U.S. 367 (1968) (prohibition of draft-card destruction is constitutional, notwithstanding any expressive component).

dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption, *such threats may be punished more severely*. . . .

Id. at 2561 (emphasis added).

A. Excessive Violence

Bias crimes are more violent than non-bias crimes. Indeed, bias crimes are at least three times more likely to involve criminal assault than non-bias crimes. These assaults are twice as likely to cause injury and four times more likely to result in hospitalization as non-bias assaults.^{6/} Unlike crimes based on personal conflict or pecuniary gain, there is little a victim can do to lessen the severity of such an attack. Bias crime victims cannot easily appease an attacker by turning over property or by apologizing for past conduct. The violent purpose behind the crime generally eliminates the opportunity for a victim

^{6/} See, B. Levin, *Bias Crimes: A Theoretical And Practical Overview*, forthcoming 4 Stan. L. & Pol'y Rev. at 3-4 (hereinafter "Bias Crimes"), and J. Levin and J. McDevitt, *Hate Crimes: The Rising Tide Of Bigotry and Bloodshed* at 15, forthcoming Spring 1993 (hereinafter "Hate Crimes"). Copies of these sources have been lodged with the Court and provided to counsel for the litigants. Page references are to the lodged copies.

to lessen his or her injury through any meaningful act of compliance.

B. Random and Irrational Nature

The irrational nature of bias crimes is particularly disruptive and threatening both to victims and to the community. Compared to conventional crimes, bias crimes are far more likely to be committed randomly against victims by complete strangers.^{7/} Criminologists have concluded that there is far greater societal disruption from random acts of violence than there is from those violent acts which have some rational cause.^{8/} The disruption to society is significant when whole groups of citizens are placed in constant fear of random violence from attackers with whom they have no direct connection.

C. Multiple Offenders

Bias crimes are at least twice as likely to involve multiple offenders acting in concert, often against a single victim. Nationally, approximately 25% of violent crimes are committed by two or more offenders.^{9/} In contrast, an analysis of the jurisdictions having the most credible bias crime statistics reveals the disproportionate involvement of multiple offenders.

^{7/} *Bias Crimes*, *supra* n. 6 at 4-5; *Hate Crimes*, *supra* n. 6 at 16.

^{8/} *Hate Crimes*, *supra* n. 6 at 17.

^{9/} *Bias Crimes*, *supra* n. 6 at 4-5; *Hate Crimes*, *supra* n. 6 at 21.

In Maryland, 71% of the bias crime cases involved multiple offenders.^{10/} The comparable figures for New York City and Boston, respectively, were 75% and 64%.^{11/} The Boston study reveals that most attacks involved four or more perpetrators and a lone victim.^{12/} Such violent group conduct presents unique dangers because: (1) offenders are empowered by the heightened sense of dominance and exhilaration that results from group action; (2) individual offenders lose a sense of direct accountability for actions that occur at the hands of a group; and (3) the group offers anonymity.^{13/} An analysis of lynchings in the first part of this century revealed that "the larger the mob, the more atrocious and savage the lynching and the more likely [it is] to include burning or mutilating the victim."^{14/} More recently, many of the most publicized bias homicides, including the 1981 Klan lynching of teenager Michael Donald in Mobile, Alabama, the murder in Bensonhurst, New York of Yusef Hawkins, a young black teenager, and last year's stabbing of a rabbinical student in Brooklyn, involved uncontrolled group attacks on lone victims. Such violence by disorderly crowds frequently results in more severe injuries, greater

^{10/} Maryland State Police Criminal Intelligence Division: *Hate/Bias Incident Assessment*, at 17 (1991).

^{11/} James Garofalo, *Bias and Non-Bias Crimes In New York City: Preliminary Findings*, at 16 (manuscript, 1990); *Bias Crimes* at 4.

^{12/} *Hate Crimes* at 22.

^{13/} Daniel Goleman, *As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism*, N.Y. Times, June 29, 1990, at C5.

^{14/} *Id.*

community disruption and disproportionate diversion of scarce police resources.

D. Serial Nature

An analysis of Boston Police Department figures confirms that bias victims are often subjected to a series of attacks^{15/}; a study by the National Institute Against Prejudice and Violence revealed that two-thirds of the victims of intergroup violence were attacked repeatedly.^{16/} Conventional criminal statutes do not adequately deter bias crimes.^{17/} Before the passage of Massachusetts' criminal civil rights statute, the Boston Police Department consistently responded to repeat bias crimes committed either against the same victims, by the same perpetrators, or both. The first case prosecuted in the state under this statute involved a group of individuals whose members had been repeatedly arrested for committing criminal acts against the same group of

^{15/} Jack McDevitt, *The Study Of The Character Of Civil Rights Crimes In Massachusetts* (1983-1987) (November 1989) (hereinafter "The McDevitt Study") (Paper presented to the American Society of Criminology at 3. Copies of *The McDevitt Study* have been lodged with the Court and provided to counsel for the litigants.)

^{16/} National Institute Against Prejudice & Violence, *The Ethnoviolence Project, Institute Report No. 1*, 5 (1986) (hereinafter "Ethnoviolence Project").

^{17/} See generally, Chuck Wexler and Gary T. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205 (1986) (hereinafter "Law and Order"); Virginia N. Lee, *Legislative Response to Hate - Motivated Violence: The Massachusetts Experience And Beyond*, 25 Harv. C.R. - C.L. L. Rev. (1990).

minority families.^{18/} After Boston began widespread enforcement of the statute, repeat incidents dropped significantly and the overall level of reported bias crimes in Boston fell by two-thirds.^{19/}

E. Risk of Social Disorder

The interchangeability of victims based merely upon perceived status heightens the social disruption associated with bias crimes. The substitutable nature of the victimization places entire classes of people on notice that they face a threat over which they have little meaningful control.^{20/} The potential for conflict that flows from this characteristic of bias crimes creates particularly explosive situations, where one incident can lead to a series of related acts of random inter-group retaliation. A New York State task force recently concluded that "[a] single incident can be the tragedy of a lifetime to its victim and may be the spark that rends and disrupts an entire community."^{21/}

Bias-related tensions, particularly those involving race, have consistently sparked this nation's most violent

^{18/} Telephone interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Unit (Nov. 12, 1992).

^{19/} See generally, *Law and Order*, *supra* n. 17; *Community Disorders Unit Incident Breakdown 1978 to 1991* in Boston Police Dept., 1991 Yearly Report, Feb. 4, 1992.

^{20/} *Hate Crimes*, *supra* n. 6 at 20.

^{21/} Governor's Task Force on Bias-Related Violence, Final Report at E.S. 10 (1988).

and disruptive civil disorders. Ample statistical evidence illustrates how one incident can spark a series of incidents of random retaliation.^{22/} According to police, perpetrators commonly refer to the initial incidents as their motivation for committing subsequent offenses. A notable example occurred in the Bronx in January 1992, after two minority youths were beaten, robbed, smeared with white sneaker polish and told it was "their day to be white."^{23/} The borough experienced more bias crimes in January than in the previous four months combined. New York City as a whole experienced two and one-half times the number of bias crimes in January than it had in December.^{24/} The mayor, additional police and social service personnel were summoned to the area to diffuse tension in the community.^{25/}

F. Limits Exercise of Civil Rights

Bias crimes are distinctive because they directly and forcefully interfere with the exercise of civil rights. A recent study of the Boston Police Department's bias crime data shows that the majority of bias offenders committed their crimes merely because an individual was driving, working, passing through or moving into a neighborhood.

22/ See Appendix at A3-5.

23/ Lynda Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, January 28, 1992, at B1.

24/ New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992).

25/ Telephone Interview with Dennis deLeon, New York City Commission on Human Rights, November 15, 1992.

The study found, "The lack of public access to certain neighborhoods in our cities is a truly serious problem."^{26/}

There also is a direct connection between bias crimes and interference with housing rights:

Attempts to deprive minorities of equal access to housing through harassment, intimidation, threats, vandalism, arson and other acts of violence persist and have intensified. This is true twenty years after the enactment of the Federal Fair Housing Act and the extension of the New York State Human Rights Law to non-public housing more than 25 years ago.^{27/}

Fewer than one-half of the white respondents in a 1988 Newsweek poll said they preferred to live in a racially mixed neighborhood.^{28/} The presence of minorities in ethnically changing neighborhoods frequently results in criminal victimizations. A 1987 study concluded that "[m]inority families are at risk in many communities from hard-core racists who see their all-white

26/ *The McDevitt Study*, *supra* n. 15.

27/ Governor's Task Force on Bias-Related Violence, Final Report at 242 (1988).

28/ *Black and White: A Newsweek Poll*, Newsweek, March 7, 1988, at 23.

neighborhoods as the last bastions of segregation.^{29/} Justice Blackmun concluded in *R.A.V.*, "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes . . ." 112 S.Ct. at 2561.

G. Effect on Victims

In a study by the National Institute Against Prejudice And Violence, researchers concluded that victims of bias-type attacks suffered 21% more psychological and physiological symptoms than victims of the same crimes that were not bias-related.^{30/} Another study by the National Institute's Ethno-Violence Project concluded that "[m]any victims fear for their safety and for their family's safety . . . many of them report changes in their lifestyle -- where they walk, how they answer the phone and the . . . fear can disrupt totally the lives of some victims".^{31/}

H. Adverse Effect on Community

Bias crimes diminish the quality of life in the community. Criminologists have found that disorderly or threatening conduct within a community, rather than direct violent victimization, is far more responsible for the fear and anxiety felt by most citizens.^{32/} This communal suffering is as relevant as any individual suffering that might occur as a result of these crimes.

I. Cumulative Terroristic Effect

According to the FBI, terrorism is "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives."^{33/} The fact that bias crimes are more likely to involve excessive violence, random and serial attacks, multiple unknown offenders and a high risk of social disorder makes the offense especially threatening to victims and to their immediate community. Accordingly, criminologists regard these offenses as being terroristic.^{34/}

29/ *Move-In Violence: White Resistance to Neighborhood Integration in the 1980's*, Special Report, Southern Poverty Law Center (1987); Smothers, *Blacks in White Areas Are Found Focus of High Rate of Crimes*, N.Y. Times, April 28, 1990, at A1.

30/ National Institute Against Prejudice and Violence, *National Victimization Survey*, 1989.

31/ *Ethnoviolence Project, supra*, n.16.

32/ Wilson & Kelling, *Broken Windows*, Atlantic Monthly, March 1982 at 29.

33/ Pomerantz, *The FBI and Terrorism*, FBI Law Enforcement Bulletin, Oct. 1987, at 14-15.

34/ *Hate Crimes, supra*, n. 6 at 214.

J. Requirement of Additional Resources

Bias crimes require a disproportionate allocation of government resources.^{35/} Because of the frequent lack of a direct personal connection between the parties and the lack of tangible evidence, such as stolen property, it is more difficult for police to effect arrests in bias crime cases. Arrest rates for bias crimes are generally less than 25%,^{36/} even though at least half of them involve direct physical confrontation.^{37/} In contrast, the overall arrest rate for violent crimes is about 48%.^{38/} These differing arrest rates cannot be attributed simply to a lack of police effort in investigating bias crimes. In New York City, 85% of bias crimes received follow up investigative time of more than a month, while only 2% of non-bias crimes did. New York City police filed 3 or more investigative reports in 93% of the bias cases, but only 7% of the non-bias cases resulted in 3 or more report filings.^{39/}

35/ Garofalo, *supra*, n. 11 at 17-18.

36/ *Bias Crimes: supra*, n. 6 at 4.

37/ *Id.* at 3.

38/ U.S. Department of Justice, *Report to the Nation on Crime and Justice*, 2d ed., March 1988, at 69.

39/ When intergroup tensions are ignited, they often require a substantial law enforcement presence to control. After a fatal mixed-race auto accident in Brooklyn in August 1991, 1,500 police officers were needed to contain the resulting riots, which lasted for four days and resulted in 180 arrests. John Kifner, *Police Brace for Riots in Brooklyn*, N.Y. Times, Aug. 24, 1991, at A27.

CONCLUSION

Justice Stevens recently stated, "[n]either a trespass on private property nor an assault against an individual need be characterized as speech in the Constitutional sense."^{40/} It has never been supposed that, when a criminal is motivated by an invidious idea or philosophy in carrying out his or her criminal purpose, the motivating idea or philosophy is somehow beyond examination for the purpose of determining an appropriate punishment. *A fortiori*, there can be no such limitation where the effects of the conduct in question are as devastating and as widespread as the effects of bias crimes. For all of the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Henry J. Silberberg

Counsel of Record

Mark Solomon

Stroock & Stroock & Lavan

2029 Century Park East, 18th Floor

Los Angeles, California 90067

(310) 556-5800

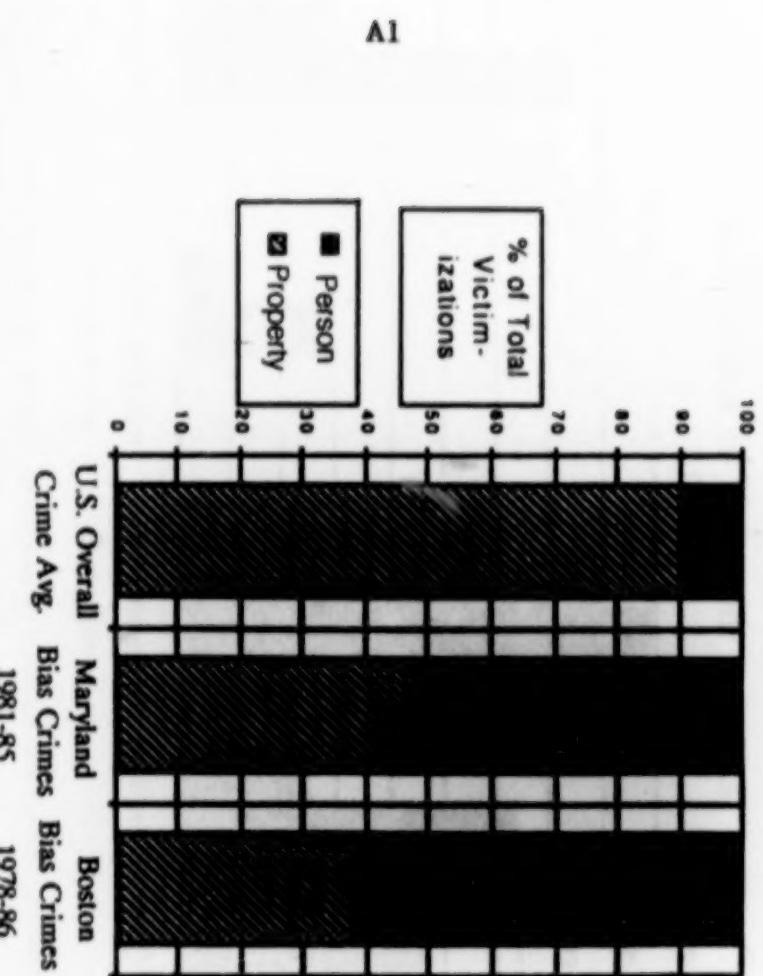
Attorneys for Amici Curiae

40/ *The Freedom of Speech*, remarks of John Paul Stevens, Associate Justice, United States Supreme Court at Yale Law School, October 27, 1992.

APPENDIX

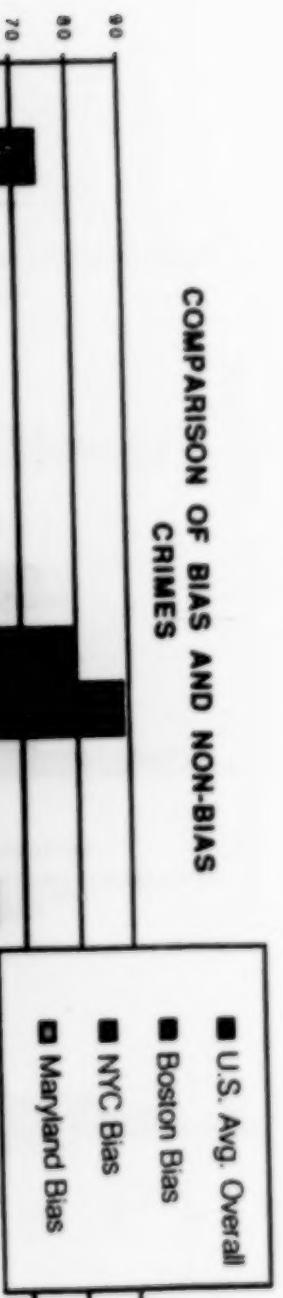
The Relative Frequency Of Person/Property Attacks Of Various Bias And Non Bias Crimes	A1
Comparison Of Bias And Non-Bias Crimes	A2
The Impact: A Pattern Of Attacks	A3, A4
The Conflict Generating Potential Of Bias Crimes: The Bronx, New York 1991-1992	A5
Description Of The <i>Amici Curiae</i>	A6

The Relative Frequency of Person/Property Attacks of Various Bias and Non Bias Crimes



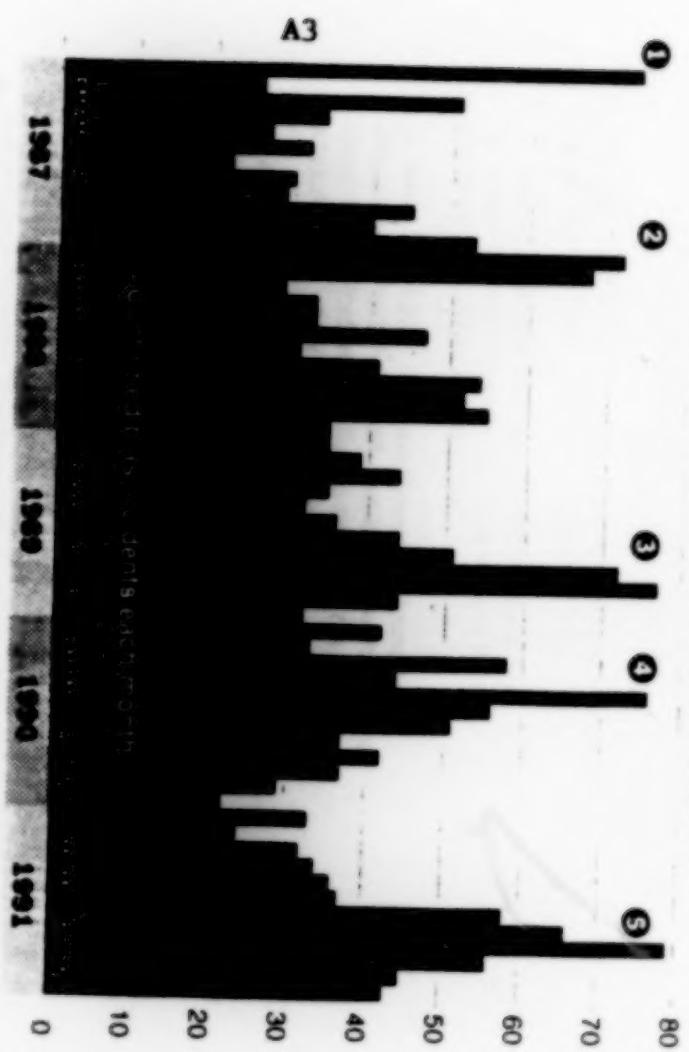
Source: FBI Crime in The United States 1985; Maryland State Police-Criminal Intelligence Division; Boston Police Department Community Disorders Unit, Incident Breakdown.

COMPARISON OF BIAS AND NON-BIAS CRIMES



© 1992 Stanford Law & Policy Review, From B. Levin, Bias Crimes: A Theoretical and Practical Overview. (Forthcoming, 4 Stan. L. & Pol'y Rev. 1993)

The Impact: A Pattern of Attacks



Legend on Following Page

© 1992 New York Times, Reprinted With Permission. All Rights Reserved

Source: New York City Police Department

The Impact: A Pattern of Attacks

Reports of bias attacks tend to peak shortly after a widely publicized incident.

1. Dec. 20, 1986 Michael Griffith, a black man, is killed in Howard Beach, Queens, as he is chased onto a highway by a group of white men.

2. Nov. 28, 1987 Tawana Brawley is found in Wappingers Falls, N.Y., with racial slurs written on her torso. Law-enforcement officials later say her report of assault by six white men is a hoax.
^{A4}

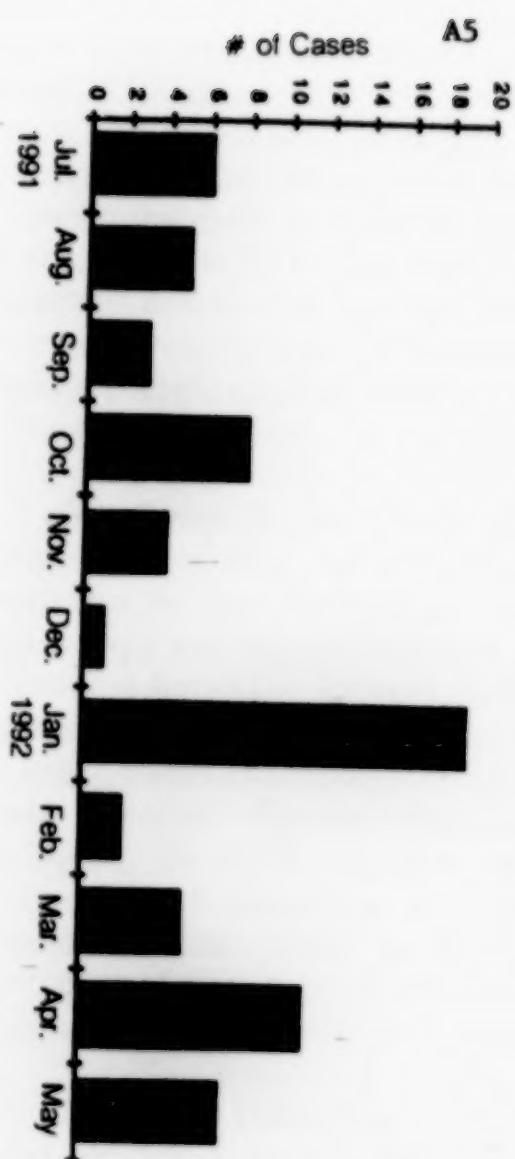
3. Aug. 23, 1989 Yusuf Hawkins, a black teen-ager, is confronted by a gang of white teen-agers and shot in Bensonhurst, Brooklyn.

4. April and May 1990 A dispute between a Korean grocer and a black customer in the Flatbush section of Brooklyn provokes demonstrations.

5. Aug. 19, 1991 A Jewish driver loses control of his car in Crown Heights, Brooklyn, killing a black child.

© 1992 New York Times, Reprinted With Permission. All Rights Reserved

The Conflict Generating Potential of Bias Crimes:
The Bronx, New York 1991 - 1992



Source: New York City Police Department

DESCRIPTION OF THE *AMICI CURIAE*

The California Association of Human Rights Organizations ("CAHRO") is a state-wide network of human rights and human relations associations. Its purpose is to promote full acceptance of all persons in all aspects of community life without regard to any arbitrary definition of differences; to engage in activities designed to protect basic human and civil rights; to participate in the development of public policy related to human and civil rights; and to serve as a resource in the resolution of inter-ethnic and inter-group conflicts. The municipalities and areas in which CAHRO's member organizations are located represent approximately 2/3's of the population of the State of California.

The Center for Democratic Renewal ("CDR") is a national nonprofit, tax-exempt clearinghouse for information on constructive non-violent responses to hate group activity and bigoted violence. Founded in 1979 as the National Anti-Klan Network, today, the CDR conducts programs of research leadership training, community organizing, public education and litigation. With offices in Atlanta, Georgia; Kansas City, Missouri and Seattle, Washington, the CDR also aids the victims of bigoted violence through telephone counseling and emergency assistance. The CDR serves a diverse national constituency of more than 10,000 members and supporters throughout the United States.

Community United Against Violence ("CUAV") is a 13 year old San Francisco-based nonprofit organization dedicated to preventing violence against lesbians and gay men as well as providing direct services to treat the victims of hate violence against lesbians and gay men.

CUAV programs involve victim support, education, and community outreach. CUAV is one of the first organizations of its kind in the United States.

The Human Rights/Fair Housing Commission of the City and County of Sacramento is a government agency responsible for inter-group relations and the maintenance of equal opportunity in such areas as employment and housing.

The International Association of Official Human Rights Agencies is the non-profit association of statutory human rights and human relation agencies primarily located in the United States and Canada. The United States member agencies are responsible for enforcing a variety of state and local civil rights laws in their respective jurisdictions. Many of the member agencies have responsibility for monitoring, investigating, and/or, through educational outreach programs, combatting bias crimes and underlying inter-community tensions which lead to such crimes. A number of the agencies act as advocates for the victims of bias crimes and provide assistance in dealing with the emotional and psychological impact of such crimes. Some member agencies provide training to law enforcement officers in identifying, investigating and resolving bias crimes.

The Los Angeles County Commission on Human Relations is a government agency that was founded in 1944. It is one of the oldest human relations agencies in the United States. Its primary mission is to promote improved human relations, civic peace, inter-group understanding, and the full acceptance of all persons in all aspects of community life. It is also the Commission's objective to reduce and eventually eliminate inter-group

violence, conflict, and tension, as well as discrimination and prejudice based upon race, religion, sex, sexual orientation, national origin, age, disability, or any arbitrary factor.

The National Association of Human Rights Workers ("NAHRW"), organized in 1947, is composed of individuals who are engaged in human and civil rights work as professionals. The NAHRW encourages collection and sharing of ideas and information on the improvement of inter-group relations as well as the exchange of information and research on dealing with racial, religious and ethnic cultural relations.

The New York City Commission on Human Rights is the government agency mandated by the New York City Administrative Code to combat discrimination in housing, employment and public accommodations and to enhance the quality of inter-group relations in the City of New York.

The New York City Gay and Lesbian Anti-Violence Project ("AVP") founded in 1980, provides counseling and advocacy to men and women who have been victims of anti-gay or anti-lesbian violence, sexual assault, domestic violence, HIV-related violence and other forms of crime. AVP is the only lesbian and gay identified crime victim service provider in New York State, and the only crime victim agency to devote substantial resources to bias-related violence. During 1991, AVP provided services to survivors in 592 cases of anti-gay/lesbian crime, a 93% increase over 1990.

North Carolinians Against Racist And Religious Violence is a statewide nonprofit organization which

monitors white supremacist organizations in the state; provides victim assistance; educates on issues of racism and bigotry; and advocates for changes in public policy.

The Santa Clara County Human Relations Commission is a government agency that advocates for and takes affirmative action to eliminate prejudice and discrimination in Santa Clara County, California, based on race, religion, national origin, cultural background, sex, age, sexual orientation or disability, and to promote peace and harmony in the community between individuals and between groups.